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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LLOYD THURMAN, Defendant and Appellant.	C074919 (Super. Ct. No. 12F06007)

Defendant Kenneth Lloyd Thurman appeals from a judgment of conviction following a jury trial. Defendant robbed and shot a bicyclist on a Sacramento bicycle trail. He was charged with robbery, possession of a firearm by a felon, and allegations of discharging a firearm causing great bodily injury (GBI), and personally using a firearm. He was also charged with a prior serious felony conviction allegation and five prior prison commitment allegations. A jury found defendant guilty on all counts and found multiple firearm enhancement allegations true. In a bifurcated proceeding, the trial court

found the recidivist allegations to be true. The trial court sentenced defendant to 45 years to life in prison.

On appeal, defendant contends that the trial court should have discharged a juror upon learning about a hallway conversation among jurors, and defendant was prejudiced by the court's failure to do so. Additionally, we granted defendant's request for supplemental briefing on the impact of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620), effective January 1, 2018, and whether the matter must be remanded for the trial court to consider whether to exercise its newly authorized discretion to strike the firearm enhancements. Also, in our review of the record, we have noted that the trial court failed to impose sentences on the lesser firearm enhancements and stay execution of those sentences pursuant to section 12022.53, subdivision (f). (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122-1123, 1128-1130 (*Gonzalez*).)

We shall remand for the trial court: (1) to consider whether to exercise its discretion to strike any or all of the Penal Code sections 12022.5 and 12022.53[1] firearm enhancements, and (2) in the event that the court declines to exercise its discretion to strike any or all of the firearm enhancements, to impose sentences on all firearm enhancements it does not strike, and stay execution of all but the longest of the firearm enhancement sentences pursuant to section 12022.53, subdivision (f). We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Charges

The information charged defendant in count one with robbery in the second degree (§ 211), and in count two with possession of a firearm by a felon (§ 29800, subd. (a)(1)). The information also alleged that, in the commission of count one, defendant personally

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[1] Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

and intentionally discharged a firearm proximately causing GBI (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). The information further alleged that defendant suffered one prior serious felony conviction (§§ 667, subds. (b)-(i), 1170.12), and that he had five prison commitment priors (§ 667.5, subd. (b)).

The Trial Evidence

The Prosecution's Case-in-chief

The victim testified that he was riding his bicycle on a trail around 3:00 p.m., which was his daily exercise regimen, when he encountered defendant. The victim had his cell phone in one hand when he came up behind defendant, who was walking on the trail. The victim testified that defendant then turned around, looked at him, brandished a small firearm, and ran toward him. The victim dismounted his bicycle, threw his phone in defendant's direction "hoping he would go for it," and kept his hands in the air. He testified that, as he was backing up, defendant kept coming toward him, demanding, "Give it up. Give it up." Defendant then asked the victim if he had a gun, which the victim denied. While the victim had a box cutter in his pocket, he denied removing or brandishing it. Defendant then told the victim to take off his clothes. The victim removed his clothing as instructed, and when he was left with only his socks on, he ran away from defendant. He testified that defendant came within about three feet of him before he ran away. The victim further testified that, as he was running away, defendant said, " 'Take this with you, nigger,' " and shot him in the right thigh.

The victim testified that he made it to a nearby road, flagged down motorists for help, and was taken to a hospital for treatment. The treating physician at the hospital testified that he opted not to remove the bullet because the risks of surgery outweighed the benefits of removing the bullet. The victim testified that the bullet is still in his leg, he suffers residual effects of pain and weakness in the leg, and he could feel the bullet

move in his leg at times. He explained that his doctor advised him that the bullet could eventually surface near the skin, and if it does, it could be safely removed.

Sacramento Police Officer Michael Boyd testified that he responded to the report of the shooting and found defendant, who matched the suspect's description, in the vicinity of the shooting. Officer Boyd testified that defendant started running away from the police car as soon as Boyd and his partner exited the vehicle. As Boyd chased defendant on foot, Boyd saw defendant throw a handgun onto the roof of a nearby building. Defendant continued to run until another officer stopped him with a Taser, and he was then taken into custody.

A loaded semiautomatic .380-caliber handgun was recovered from the roof of the building where Boyd saw defendant throw his handgun. A pill bottle containing .380-caliber bullets was recovered from defendant's pants pocket. A particle of gunshot residue was found on defendant's hand.

A cell phone was recovered from one of defendant's pockets. Officer Brian Laird testified that he dialed the cell phone number provided by the victim and the phone found on defendant rang.

The victim identified in a photograph the handgun recovered from the rooftop as the weapon defendant brandished during the robbery. The victim also identified defendant in a live lineup.

Defense Evidence

The defense's theory of the case was that defendant shot the victim in self-defense after the victim brandished a box cutter and because defendant, who was under the influence of methamphetamine, believed the victim was a member of a drug dealer's gang which was out to get him.

Defendant testified that at the time of the shooting, he had been "strung out on crystal meth for a few days" and was headed home on the bicycle trail to "get cleaned up." He testified that he was paranoid because the previous day, he had an altercation

with a drug dealer named "Panama Joe" over some drugs he had purchased. Defendant testified that, when he attempted to get his money back, he was beaten up by Panama Joe's gang and the gang then chased him away with firearms. Defendant testified that he purchased a handgun from another drug user to protect himself in the event he ran into Panama Joe's gang again. He then used methamphetamine all night without sleeping and went to McDonald's for breakfast where he saw two of the men from Panama Joe's gang who had beaten him the day before. Defendant said he panicked and ran away.

Defendant testified that he ended up walking on the bicycle trail to get home. He saw the victim come up behind him quickly on a bicycle and noticed that the victim was wearing a hoodie with his hands in the pockets despite the hot weather. Defendant stepped aside to let the victim pass but noticed the pedaling sound had stopped. He testified that he then turned around and saw the victim coasting on his bicycle in defendant's direction with a box cutter in his hand. Defendant, still under the influence of methamphetamine, saw the victim get off his bicycle and begin advancing toward him. Defendant then pulled his gun out of his pocket. He testified that the victim said to him, "We ain't letting you get away." Defendant told the victim to lift up his shirt to show that he did not have another weapon. Defendant testified that the victim then unexpectedly took off all his clothing. He denied ordering the victim to disrobe. When the victim started unbuckling his pants, defendant asked him "Dude, what are you doing?" Defendant testified that he did not know what was going on, started panicking, and backed away from the victim. Defendant then waved the gun and told him "Dude, just get out of here." He waived the gun in a way to suggest that the victim should leave. Defendant testified that the gun must have accidentally discharged. He claimed he did not hear the gunshot because of the traffic in the area and did not realize that the victim had been shot until his arrest.

Defendant testified that after the victim ran away, he noticed the victim's cell phone on the ground and took the phone so he could call his wife. He claimed that when

he saw police officers, he ran because he knew it was illegal for him to be in possession of a handgun, and he threw his gun on a roof so that the police would not shoot him. He denied taking the victim's bicycle.

The Prosecution's Rebuttal Evidence

Defendant acknowledged during the defense case that he did not tell the police about the box cutter in his initial interview but claimed that he did tell the police that the victim had a weapon. Officer Laird, the officer who interviewed defendant, testified in rebuttal that defendant did not mention that the victim had brandished a box cutter or any other weapon. Contrary to defendant's testimony in which he denied taking the victim's bicycle, Officer Laird testified that defendant admitted he took the victim's bicycle after the altercation.

Verdict and Sentencing

The jury found defendant guilty on all counts and found all firearm enhancement allegations true. That same day, in a bifurcated proceeding, the trial court found all prior conviction and prior prison commitment allegations true.

The trial court sentenced defendant to an aggregate term of 45 years to life calculated as follows: on count one, robbery in the second degree—the upper term of five years, doubled to 10 years by the strike prior, plus five consecutive years for the prior serious felony conviction and five consecutive years for the five prison commitment priors, plus an indeterminate term of 25 years to life for the section 12022.53, subdivision (d), firearm enhancement; on count two, possession of a firearm by a felon—the midterm of two years doubled to four years by the strike prior, to run concurrently with the sentence imposed on count one. The trial court made no reference to the section 12022.5, subdivision (a), and 12022.53, subdivisions (b) and (c), enhancements when it imposed sentence. Nor does the abstract of judgment mention those enhancements.

DISCUSSION

I. Denial of Motion to Discharge Juror No. 4

A. Additional Background and Defendant's Contentions

At the beginning of trial, the court instructed the jury: "During the trial, do not talk about this case or about any of the people or any subject involved with this case [with] anyone, not even your family, friends, spiritual advisors, or therapist. [¶] . . . You must not talk about these things with the other jurors, either, until the time comes for you to begin your deliberations."

At the end of the trial, before the jury began deliberations, the trial court instructed the jury: "As I told you at the very beginning of the case, do not talk about the case or about any of the people or any subject involved in it with anyone . . . . [¶] You must discuss the case only in the jury room and only when all jurors are present together."

On a morning after the jury began its deliberations, Juror No. 9 called the court to say she had overheard a conversation between Juror No. 6 and someone she believed to be Juror No. 4 in the courthouse hallway on the previous court day, just before deliberations began. The court examined Juror No. 9 outside the presence of the rest of the jury. Although Juror No. 9 could not hear "word-for-word" what the two other jurors had said, she stated that she "could tell they were talking about the case to each other." She explained that she had the impression that the two jurors were "venting" about "how can this and that happen." She said that she believed that Juror No. 3 overheard the conversation as well.[2] The court asked Juror No. 9 whether the conversation affected her impartiality, and she said that it did not.

The court then questioned Juror No. 6 about the conversation. Juror No. 6 admitted that he had a brief conversation with another juror in the hallway about whether

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[2] The court interviewed Juror No. 3, and she said she did not hear anyone discuss the case.

they would have "a conclusion by the end of the day," but did not "really discuss any details." He also said that another juror "made a comment about something," but other jurors said, "shh," so he did not hear what was said. The court asked him if the conversation contained "anything that happened during the case" or "more scheduling," and the juror confirmed that it was about scheduling. After questioning Juror No. 6 further about the substance of the conversation, the court admonished him, "[Y]ou're not to discuss the case in the hall in any way. And now that you all are in deliberations, even discussions about scheduling should occur in the jury deliberation room." The court also confirmed that the hallway conversation would not influence Juror No. 6's impartiality.

Lastly, the court questioned Juror No. 4. The court asked him whether the facts of the case were discussed during the hallway conversation, and Juror No. 4 replied, "I don't remember any of the facts being said. It was just like general stuff, like what crooks do and, you know, generalization on that subject." The court questioned him further about whether he was discussing "crooks" in the context of this case, and the juror said that he mentioned "just crooks in general and what makes them do what they do." Thereafter the court asked the following questions and Juror No. 4 gave the following answers:

"THE COURT: All right. And so Juror [No.] 4 . . . , do you believe that before you got into the jury deliberation room you had made up your mind about the case -- about this case?

"JUROR [No.] 4: Um, no, I wouldn't say a hundred percent.

"THE COURT: Because you know, as the Court has instructed, you have to have an opened [*sic*] mind, you have to listen to all the evidence, and that you then go into the jury deliberation room and you have an obligation to state what you feel about the case but also to listen to the views of each and every other juror?

"JUROR [No.] 4: Sure.

"THE COURT: All right. And so can you promise us that that is your mindset?

"JUROR [No.] 4: I can.

"THE COURT: Okay. And can you also promise us that you please do not talk about in the hall, don't make any comments about criminal law in general or --

"JUROR [No.] 4: You have my word.

"THE COURT: Okay. Because we don't want there to be something said that could be misconstrued by others.

"JUROR [No.] 4: That makes sense."

Following this colloquy with Juror No. 4, the trial court discussed the situation with counsel. Defense counsel expressed concern about whether Juror No. 4 could be fair and impartial because he was discussing "what crooks do" while serving on a jury in a criminal case, and because he hesitated when the court asked if he had made up his mind before deliberations. The court took a brief recess to review case law on the matter.

Thereafter, the court ruled as follows: "In this case I do not find that Juror [No.] 4, or any of the jurors for that matter, violated the Court's admonitions with respect to not discussing this case and not forming or expressing any belief about this case." The court then ruled that, even if there was misconduct, any misconduct was "of a trifling nature and it does not establish as a demonstrable reality that the juror, or any juror on this case, is unable to perform his or her duty." The court went on to find that Juror No. 4's "fleeting comment . . . does not establish to a demonstrable reality that he has pre-judged the case, and certainly does not establish that he is a biased juror. And he, in fact, has affirmed that he can follow the law and the Court's admonitions." The court then denied the defense request to remove Juror No. 4, and asked counsel whether they wanted to request any additional curative instructions. Defense counsel stated that she thought that the court "properly admonished the offending jurors" and did not request any further curative instructions.

On appeal, defendant contends that, because doubt was cast on Juror No. 4's ability to perform his duties, the trial court erred in failing to discharge the juror. Specifically, he asserts that "Juror [No.] 4 necessarily rejected deliberation on all of [the]

issues with his reference to 'crooks' and the acknowledgment that he had largely made up his mind before deliberations had begun." He contends that this was misconduct and raised a presumption of prejudice, which was not rebutted. Based on this hallway conversation, defendant contends that he was denied due process and a fair trial. We disagree.

B. Right to Impartial Jury, Discharging Jurors, and Standard of Review

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it." ' " (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294 (*Hamilton*).) "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (§ 1089.)

Thus, a trial court has the authority to discharge a juror if it finds the juror is unable to perform his or her duty, which includes engaging in serious and willful misconduct. (§ 1089; *People v. Harris* (2013) 57 Cal.4th 804, 856 (*Harris*); *People v. Daniels* (1991) 52 Cal.3d 815, 863-864, 866; *People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) The trial court must investigate for juror misconduct if there is information, which, if proven true, would constitute good cause to doubt a juror's ability or willingness to perform the duties of a juror and would justify the removal of the juror. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) The judge must make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and whether the impartiality of the other jurors has been affected. (*Ibid.*)

While a trial court has the authority to conduct an appropriate investigation concerning whether there is good cause to discharge a juror, and to discharge a juror, the court also has the authority to take " 'less drastic steps [than discharge] where appropriate to deter any misconduct or misunderstanding it has reason to suspect.' " (*People v. Alexander* (2010) 49 Cal.4th 896, 926 (*Alexander*).) Additionally, the trial court need not discharge a juror where the misconduct is trivial or " 'trifling' " and could not have prejudiced the defendant. (*People v. Stewart* (2004) 33 Cal.4th 425, 510 [when misconduct is of such a trifling nature that it could not have been prejudicial and where it appears that the fairness of the trial has not been affected by such impropriety, the verdict will not be disturbed].)

We review the trial court's decision of whether to discharge or retain a juror or to take some other action for abuse of discretion. (*Harris, supra*, 57 Cal.4th at p. 856; *Alexander, supra*, 49 Cal.4th at p. 927.) " ' "Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence." ' " (*People v. Martinez* (2010) 47 Cal.4th 911, 943 [trial court's refusal to discharge juror affirmed], quoting *People v. Jablonski* (2006) 37 Cal.4th 774, 807.)

C. Analysis

Here, the trial court performed a thorough investigation of the alleged misconduct and reasonably determined that Juror No. 4 did not violate the court's admonitions. We note the instructions provided to the jurors admonished them: "do not talk about this case or about any of the people or any subject involved with this case or anyone." No instructions had been provided directing the jury not to talk about general criminal justice issues or "crooks in general." "A sitting juror commits misconduct by . . . failing to follow the instructions and admonitions given by the trial court. A lay juror cannot be

expected to conform to standards of behavior of which she has not been informed." (*Hamilton, supra*, 20 Cal.4th at p. 305.) Thus, because no admonishment prohibiting discussion about criminal justice system issues in general had been given, Juror No. 4's comments did not amount to misconduct.

Further, the court properly exercised its discretion in ruling that, even if there was misconduct, it was of a trifling nature and the misconduct did not establish that the juror, or any juror on this case, was unable to perform his or her duty. We agree. The record simply does not show good cause to discharge Juror No. 4. While he admitted to mentioning "what crooks do" to another juror, he insisted that he was speaking generally and not specifically about defendant's case. This was consistent with Juror No. 6's statement that there was no discussion about the case. There is no evidence that Juror No. 4's statement was about defendant or a reference to the purported Panama Joe gang and defendant's version of events. Even assuming misconduct, like the trial court, we conclude it was trivial and, "[g]iven the . . . trifling nature of the misconduct and its minimal impact upon the case, we conclude that the record demonstrates no actual prejudice." (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1084.)

With respect to Juror No. 4's comment that he had not "a hundred percent" made up his mind about the case prior to deliberation, we conclude that substantial evidence supports the trial court's determination that the juror could fulfill his duties. In response to careful questioning by the court, Juror No. 4 promised to go into the deliberation room with an open mind and that he would listen to the views of the other jurors. Additionally, the trial court had the benefit of observing the juror's demeanor during the investigation and over the course of the trial and evaluated his responses accordingly. (*People v. Bennett* (2009) 45 Cal.4th 577, 621; *People v. Schmeck* (2005) 37 Cal.4th 240, 298, overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.) Based on its investigation and evaluation, the court was persuaded that the juror could continue to perform his duties impartially. (*Bennett*, at p. 621.) "[W]e afford deference

to the trial court's credibility determinations, 'based, as they are, on firsthand observations unavailable to us on appeal.' " (*People v. Armstrong* (2016) 1 Cal.5th 432, 451.) Under the circumstances presented here, we conclude that the trial court acted well within its discretion in deciding not to remove Juror No. 4 from the jury and instead take the less drastic step of admonishing him about his duties as a juror and to avoid conversations about the criminal justice system.

Furthermore, even if the juror had made a preliminary judgement of less than 100 percent about the case, there was no misconduct or improper bias. It is "human nature" that "a juror may hold an opinion at the outset of deliberations." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75.) A juror who holds preliminary views about the case at the beginning of deliberations does not commit misconduct, "so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations." (*Id*. at p. 73.) Courts "cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue." (*Id*. at p. 75.) The record before us does not demonstrate that Juror No. 4 refused to listen to all of the evidence, began deliberations with a closed mind, or declined to deliberate. Accordingly, we find no error.

II. Imposition of Sentence on Firearm Enhancements

Our review of the record reveals a sentencing error related to three of the firearm enhancements. The trial court did not impose sentences on the section 12022.5, subdivision (a), and 12022.53, subdivision (b) and (c), enhancements found true in connection with count one. This was error. The trial court should have *imposed a specific sentence* on each enhancement and *then stayed execution of those sentences* pursuant to section 12022.53, subdivision (f).

Section 12022.53, subdivision (f), provides, in pertinent part: "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the

court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section . . . 12022.5 . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this section." Our high court has interpreted this provision to require trial courts to impose a specific sentence on any lesser firearm enhancement and then stay execution of that sentence, in the same way a trial court would impose and stay execution of sentence on counts subject to section 654. (*Gonzalez, supra*, 43 Cal.4th at pp. 1122-1123, 1128-1130.) This practice preserves the possibility of executing the stayed sentence of a lesser firearm enhancement should a reversal on appeal eliminate the unstayed sentence on the greater enhancement. (*Id*. at p. 1128.)

In *People v. Alford* (2010) 180 Cal.App.4th 1463, this court concluded that the "futility and expense" of remand militated against sending the case back to the trial court for proper sentencing under section 654 where this court could determine the sentence that the trial court, in the exercise of its discretion, "undoubtedly" would have imposed and stayed. (*Alford*, at p. 1473.) However, our statutory authority to modify an unauthorized sentence (§ 1260) does not authorize us to substitute our judgment for that of the trial court with respect to discretionary sentencing decisions. (*People v. Lawley* (2002) 27 Cal.4th 102, 171-172; *People v. Hines* (1997) 15 Cal.4th 997, 1080.) The section 12022.53, subdivisions (b) and (c), enhancements pose no issue in this regard because the statutorily prescribed sentences for these enhancements are 10 and 20 years respectively. However, the section 12022.5, subdivision (a), enhancement provides for imposition of a sentence of three, four, or ten years. On this record, we cannot say what sentence of this triad the trial court "undoubtedly" would have imposed on the 12022.5, subdivision (a), enhancement before staying execution of that sentence pursuant to section 12022.53, subdivision (f). (See *Alford*, at p. 1473.)

Accordingly, we shall remand the matter to the trial court for resentencing so that, unless the court exercises its discretion to strike the firearm enhancements (see part III. of

the Discussion, *post*), the court may select a triad option on the section 12022.5, subdivision (a), enhancement and impose sentence on that enhancement as well as the section 12022.53, subdivision (b) and (c), enhancements, and then stay execution of those sentences pursuant to section 12022.53, subdivision (f). If the trial court does exercise its discretion to strike the section 12022.53, subdivision (d), enhancement (as well as any others), but does not strike any or all of the lesser firearm enhancements, it should impose and execute a sentence on the remaining firearm enhancement that carries the longest term of imprisonment and impose and stay execution of the sentence on any remaining lesser firearm enhancements.

III. Senate Bill 620

While this case was pending on appeal, the Governor signed Senate Bill 620. Following the enactment of Senate Bill 620, section 12022.53 now includes language stating: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Current § 12022.53, subd. (h).) Section 12022.5 was amended to include an identical provision. (Current § 12022.5, subd. (c).) Prior to the enactment of Senate Bill 620, courts did not have discretion to strike or dismiss these enhancements. The former language of these sections explicitly provided that the courts "shall not strike" enhancement allegations under those sections. (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

We granted defendant's request for supplemental briefing on the impact of Senate Bill 620. Defendant asserts that his case must be remanded to the trial court to permit the court to exercise its newly authorized discretion to strike the firearm enhancements.[3]

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[3] Defendant's arguments in his supplemental briefing generally discuss only the section 12022.53, subdivision (d), enhancement with specificity. However, defendant's

Defendant asserts that the amendment which now grants sentencing courts the discretion to strike or dismiss section 12022.5 and 12022.53 firearm enhancements applies retroactively to his case based on legislative intent and under the rule in *In re Estrada* (1965) 63 Cal.2d 740. Defendant also asserts that remand for the trial court to consider whether or not to exercise its discretion to strike the firearm enhancements would not be a idle act.

The People concede that the amendments to sections 12022.5 and 12022.53 should be afforded retroactive application to nonfinal judgments. However, the People contend that remanding for resentencing in this case would constitute an idle act, and therefore is not appropriate. The People assert, based on defendant's criminal history and the circumstances of the charged crime, that "it would be an abuse of discretion for any court to dismiss the additional punishment that the trial court had imposed under section 12022.53, subdivision (d)." The People further assert that the trial court's choices at the original sentencing proceeding "reveal to a virtual certainty that the court would choose not to exercise its newly conferred discretion in [defendant]'s favor on remand." In this regard, the People rely on: the fact that the trial court imposed an upper term sentence on count one; the trial court's remarks that defendant " 'has an extensive prior criminal record' and 'he is a danger to society' "; and the fact that the trial court did not exercise its discretion to strike defendant's prior conviction of a serious felony or to strike any of defendant's five prior prison terms.

We accept the People's concession concerning retroactivity and conclude that the effects of Senate Bill 620 do indeed apply retroactively. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) Accordingly, we proceed to consider the People's argument that remand would be an idle act.

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supplemental briefing does refer to the firearm enhancements in the plural and asserts that the matter must be remanded for resentencing on "the firearm enhancements."

As our high court has observed, " '[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing *unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion*.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391, italics added.)

In *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), Division 2 of the Second Appellate District refused to remand, concluding "no purpose would be served in remanding for reconsideration." (*Id.* at p. 1896.)[4] The Court of Appeal in *Gutierrez* considered whether it should remand to allow the trial court to decide whether it would dismiss a strike conviction under section 1385 following our high court's decision in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court concluded that, under the circumstances of the case, "no purpose would be served in remanding for reconsideration." (*Gutierrez*, at p. 1896.) In reaching this conclusion, the Court of Appeal in *Gutierrez* noted that the trial court had done the following at sentencing: expressly "indicated that it would not, in any event, have exercised its discretion to lessen the sentence"; stated that imposing the maximum sentence was *appropriate*; and imposed an upper term sentence on the base term and two discretionary one-year enhancements, which was not required under the three strikes law. (*Gutierrez*, at p. 1896.) We also note that, in declining to strike the discretionary sentences for the one-year enhancements, the trial court in *Gutierrez* expressly stated: " 'there really isn't

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[4] Although the parties do not rely on the Second Appellate District's opinion in *Gutierrez*, we find it relevant to our analysis of this issue.

any good cause to strike it. There are lots of reasons not to, and this is the kind of individual the law was intended to *keep off the street as long as possible*.' " (*Ibid*., italics added.)

In *People v. Chavez* (Apr. 20, 2018, D069533) __ Cal.App.5th ___ [2018 Cal.App. Lexis 358, *4], Division 1 of the Fourth District of the Court of Appeal concluded that these circumstances were important in its decision to remand to allow the trial court to exercise its newly authorized discretion. "Unlike the trial court in *Gutierrez*, the trial court . . . did not impose on [the defendant] the maximum sentence possible and, in particular, imposed a lower two-year term for his count 2 conviction for assault with a deadly weapon. Also, unlike the trial court in *Gutierrez*, the court in this case did not state that [the defendant] should be '[kept] off the street as long as possible' or make any other statement clearly indicating that it would not have exercised discretion to strike or dismiss the section 12022.53, subdivision (h) enhancement even if it had the discretion to do so at the time of [the defendant]'s sentencing. [Citation.] Absent such a clear indication, the appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike or dismiss the section 12022.53, subdivision (h) enhancement under section 1385." (*Chavez*, at *4-5.)

Subsequent cases have also made clear that remand is required unless the record reveals a clear indication that the trial court would not have dismissed or stricken the firearm enhancement even if at the time of sentencing it had the discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

Here, the trial court imposed the upper term on count one upon finding that defendant had an extensive prior criminal record within the meaning of California Rules of Court, rule 4.421(b)(2), and that he was a danger to society within the meaning of California Rules of Court, rule 4.421(b)(1). However, the trial court made no express comment about the appropriateness of the sentence it imposed. It did not indicate that it

felt it appropriate to keep the defendant off the streets as long as possible as did the trial court in *Gutierrez* or make any similar statement. In fact, the trial court did not impose the maximum sentence, but instead imposed a concurrent midterm sentence on count two. Nor did the trial court here expressly reject mitigation offered by defendant. Indeed, defendant never offered any mitigation. Defense counsel submitted no statement in mitigation and did not offer an argument in mitigation at the sentencing hearing.[5] The record here simply does not support a finding that remand would necessarily be an idle act. For us to determine that remand would be an idle act, or would serve no purpose (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896), the record must include something that clearly indicates that the trial court would not exercise its discretion to strike the enhancement beyond reciting the circumstances in aggravation upon which it relied under the rules of court to support its determination to sentence defendant to the upper term on one of two counts.

The People also rely on the fact that the trial court did not strike defendant's prior serious felony conviction or any of his five prior prison terms. We note here that, while defendant did move to set aside the verdict, it does not appear on this record that he invited the court to strike his prior serious felony conviction or his prison commitment priors pursuant to section 1385 or that the court considered as much on its own motion. Under these circumstances, we are not persuaded that remand would be an idle act or would serve no purpose.

As we have noted, the trial court here did not impose the upper term on count two, but rather it imposed the midterm and ran that sentence concurrent. Thus, unlike in

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[5] The trial court did state that it received and read letters from defendant's wife, defendant's son, and defendant. The trial court then read its tentative sentencing decision, asked if defense counsel would like to be heard, and defense counsel responded: "No." The court then sentenced defendant in accordance with its tentative sentencing decision.

Gutierrez, the trial court did not impose the maximum sentence it could have imposed. It also did not impose a restitution fine consistent with the statutorily suggested formula,[6] but instead imposed what was then the statutory minimum amount of $240. Thus, the record does not demonstrate the trial court was disinclined to afford defendant any leniency.

Moreover, this case does not present an all-or-nothing scenario. Unlike in many cases where striking the firearm enhancement would result in no remaining enhancement for the firearm use because only one such enhancement is in play, here the trial court has options on remand in addition to retaining or striking all of the firearm enhancements. The trial court could choose to strike the section 12022.53, subdivision (d), enhancement and its 25-years-to-life sentence and instead impose a determinate sentence under sections 12022.5, subdivision (a), or 12022.53, subdivision (b) or (c).[7] Thus, we are not persuaded by the People's argument that the "choices that the trial court made at the original sentencing hearing reveal to a virtual certainty that the court would choose not to exercise its newly conferred discretion in [defendant]'s favor on remand."

The People's argument that remand would be inappropriate because "it would be an abuse of discretion for any court to dismiss the additional punishment that the trial court had imposed under section 12022.53, subdivision (d)" is also unavailing. The People rely upon two cases for this proposition, *People v. Bruce G.* (2002) 97

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[6] Section 1202.4, subdivision (b)(2), provides: "In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

[7] By identifying these options, we express no opinion about how the trial court should exercise its discretion on remand.

Cal.App.4th 1233 (*Bruce G.*) and *People v. Askey* (1996) 49 Cal.App.4th 381 (*Askey*), both of which are unhelpful.

In *Bruce G.*, the defendant was convicted of three counts of lewd and lascivious acts with a child under 14 (§ 288, subd. (a)) based on incidents in which he had his daughter touch his penis. (*Bruce G., supra,* 97 Cal.App.4th at pp. 1236-1239.) In addition, there was uncharged conduct evidence in the record of two separate incidents in which defendant grabbed the hands of adult women and made them touch his crotch. (*Id*. at p. 1240.) The trial court found the defendant ineligible for probation under section 1203.066, which requires proof of " 'substantial sexual conduct.' " (*Bruce G.*, at p. 1245.) Substantial sexual conduct was neither pled nor proved, and thus the trial court erred in denying probation pursuant to section 1203.066.[8] (*Bruce G.*, at pp. 1246-1247.) While the *Bruce G.* court noted, "[o]bviously, a remand for resentencing would be an idle act if it would be an abuse of discretion to grant probation in this case," it concluded that the record did not indicate a decision to grant probation would be an abuse of discretion and remanded for resentencing. (*Id*. at p. 1248.) *Bruce G.* provides no guidance that is applicable here.

In *Askey*, the defendant was convicted of attempted residential burglary. (*Askey, supra,* 49 Cal.App.4th at p. 384.) The defendant had 13 prior serious felony convictions from a single case, all of which involved separate residential burglaries and some of which involved attempted murder. (*Id*. at p. 385.) He was sentenced to 25 years to life under the three strikes law. (*Ibid*.) The defendant's appeal was pending when our high court decided *Romero, supra*, 13 Cal.4th 497, and he asked the appellate court to remand to allow the trial court to exercise its discretion to dismiss the strike allegations. (*Askey*,

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8 Subdivision (b) of section 1203.066 provides: " 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

at p. 388.) The *Askey* court held that defendant forfeited any error based on the trial court's failure to strike the prior convictions because he did not ask the trial court to do so. (*Ibid*.) It then added, "the trial court noted all of [the defendant]'s convictions involved 'completely separate incidents, different times, different places, different victims for overwhelmingly serious offenses, . . .' Because the record clearly indicates the trial court would *not* have exercised its discretion to strike a prior conviction, remand is unnecessary." (*Id*. at p. 389.) The *Askey* court reasoned that, because it appeared the defendant was a "budding 'Night Stalker,' " remand to the trial court would constitute an idle act in that any order striking a prior serious or violent felony conviction "would constitute an abuse of the trial court's discretion." (*Ibid*.) *Askey* presented a situation where the defendant was clearly not outside the spirit of the three strikes law (see *People v. Williams* (1998) 17 Cal.4th 148, 163), and thus the case provides no guidance here regarding our decision to remand.

The People also contend that "remand is unwarranted if there is a virtual certainty that the trial court would choose not to exercise discretion in favor of the appealing party." As we have already noted, we cannot conclude that a "virtual certainty" is present here. Indeed, the contrast between this case and one of the cases upon which the People rely for this proposition, *People v. Coelho* (2001) 89 Cal.App.4th 861 (*Coelho*), demonstrates why there is no such virtual certainty in the instant case.

In *Coelho*, the court addressed an issue related to the mandatory consecutive sentencing provision of the three strikes law (§§ 667, subd. (c)(6), (7), 1170.12, subd. (a)(6), (7)). (*Coelho*, *supra*, 89 Cal.App.4th at pp. 864-865.) The defendant was charged with 10 counts of lewd and lascivious conduct with a minor under age 14 (§ 288, subd. (a)). (*Coelho*, at p. 865.) The *Coelho* court concluded that the trial court erred in determining consecutive sentencing was mandatory for several counts because the counts could have been based on acts committed during a single occasion. (*Id.* at p. 886.) However, the court declined to remand the matter for resentencing so the court could

consider imposing concurrent terms because there were numerous aggravating factors justifying consecutive terms, the trial court expressly found no mitigating factors when it imposed the 10 consecutive sentences, and the court expressly stated that it would impose consecutive sentences even if it had discretion to impose concurrent sentences. (*Id*. at p. 889.) Under these circumstances, the *Coelho* court concluded it was "inconceivable" that the trial court would impose concurrent terms if it remanded for resentencing, and thus remand would have been "an idle and unnecessary, if not pointless, judicial exercise." (*Ibid*.)

In the instant case, no finding concerning mitigation was made. Moreover, as we have noted, the trial court made no express statements about how it would have exercised its discretion to strike the firearm enhancements if it had such discretion, and there is nothing in the record from which we can infer that the court would have declined to strike any or all of the firearm enhancements had it had such discretion.

There is another reason why the People's arguments—striking any of the firearm enhancements would be an abuse of discretion based on the record before us and it is virtually certain the trial court will decline to do so—are unpersuasive here. These arguments assume the defense will have nothing to add to the record. The defense may very well offer mitigation now that the trial court has the newly authorized discretion to dismiss firearm enhancements. We agree with the People's argument to the extent that they suggest defendant's age, criminal history, and the facts of this case pertaining to defendant's gratuitous use of the gun and what he said when he fired it at the victim, are factors for the trial court to consider. But this is not a situation where mitigation was offered by the defense and rejected or otherwise found to be unavailing by the trial court. There may be more that was not offered by the defense, including arguments in mitigation that may relate to a choice between an indeterminate and determinate term firearm enhancement.

In the absence of a clear indication that remand would be an idle act or would serve no purpose, we agree with defendant that the matter must be remanded for the trial court to consider whether to exercise its discretion to strike the section 12022.5 and 12022.53 enhancements.

DISPOSITION

We remand this matter to the trial court with directions to: (1) consider whether to exercise its discretion to strike any or all of the section 12022.5 and 12022.53 firearm enhancements, and (2) in the event that the court declines to exercise its discretion to strike any or all of the firearm enhancements, to impose sentences on all firearm enhancements it does not strike, and stay execution of all but the longest of the firearm enhancement sentences pursuant to section 12022.53, subdivision (f). The trial court is directed thereafter to prepare an amended abstract of judgment reflecting all of the trial court's sentencing choices on the firearm enhancements and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed in all respects.

MURRAY, J.

We concur:

HULL, Acting P. J.

HOCH, J.